



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 1465/2022P

In the matter between:

FIRSTRAND BANK LIMITED t/a FIRST NATIONAL BANK PLAINTIFF

and

**MICA FOODS CC
MESHACH PILLAY**

**FIRST RESPONDENT
SECOND RESPONDENT**

ORDER

Summary judgment is granted against the defendants, jointly and severally, one paying the other to be absolved as follows:

Claim 1. Overdraft.

1. Payment of the sum amount of R735 059. 39
2. Interest on the amount referred to in parag 1 above at the rate of prime (currency 8.25%) plus 12.25% calculated daily on the outstanding balance and capitalised monthly in arrears from 1 November 2021 to date of payment, both dates inclusive.

Claim 2. Loan

3. Payment of the amount of R156 554.41
4. Interest on the amount referred to in para 3 above at the rate of prime (currency 8.25) plus 12.25% calculated daily on the outstanding balance and capitalised monthly in arrears from 1 November 2021 to date of payment, both dates inclusive.
5. The defendants to pay costs of suit on attorney and client scale.

JUDGMENT

Delivered on:

Mngadi J

[1] The plaintiff applies for summary judgment. The two defendants oppose the application.

[2] The plaintiff is FirstRand Bank Limited t/a First National Bank a company duly registered and incorporated in accordance with the laws of the Republic of South Africa. The first defendant is Micca Foods CC a close corporation duly registered and incorporated in terms of the laws of the Republic of South Africa. The second defendant is Meshach Pillay an adult male person.

[3] On 7 February 2022 the plaintiff instituted action against the first and second defendants. The plaintiff claimed, firstly, that on 8 November 2019 it entered into an overdraft agreement with first defendant extending an overdraft facility on a revolving basis with a limit of R710 633.00 incurring interest on outstanding balance charged at prime plus 8%. The repayment of the overdraft required upon demand. The second defendant as security for the first defendant's indebtedness on the overdraft facility entered with the plaintiff into a suretyship agreement on usual terms.

[4] The plaintiff claimed that the first defendant in terms of the overdraft facility became indebted to the plaintiff in the sum of R735 059.39 plus interest from 1 November 2021 to date of final payment, which amount has become due and payable.

[5] Secondly, the plaintiff claimed that on 14 August 2018 the plaintiff concluded a revolving loan agreement with the first defendant. It provided that plaintiff would lend in advance to the first defendant an amount of R300 000.00 incurring interest on outstanding balance at prime rate plus 8.5%. The loan repayable in monthly instalments of R7 928.00. The second defendant as security for the first defendant's obligation in the loan agreement concluded with the plaintiff a suretyship agreement.

The plaintiff claimed that the first defendant breached the terms of the loan agreement by failing to pay due monthly instalments resulting in an indebtedness in the amount of R158 554.41 plus interest.

[6] The plaintiff in the summons attached the overdraft facility agreement, the revolving loan agreement and the suretyship agreements. Further, the plaintiff to prove balances outstanding as stipulated in the agreements attached certificates of balance and notices of default to both defendants dated 10 November 2021.

[7] The summons was served and on 17 March 2022 the defendants filed a notice to defend. On 9 June 2022 the defendants filed a plea. On 29 June 2022 the plaintiff lodged an application for summary judgment. On 17 August 2022 the plaintiff filed a supplementary affidavit replacing incorrect annexures attached to the affidavit in support of the application for summary judgment.

[8] The defendants in an affidavit opposing the summary judgment denied that first defendant entered into a business overdraft facility agreement attached to the summons, they denied that a loan agreement was concluded as alleged in the in the summons, and they denied that suretyship agreements were concluded. The deponent stated: *"I am of the view that such agreements were not concluded and to my best knowledge I was not ever furnished with a quotation or any agreements by the applicant"*.

[9] The defendants in the plea raised as special plea that the plaintiff had not complied with the relevant provisions of the National Credit Act 34 of 2005 (the NCA). The plaintiff in the summons stated that the NCA did not apply to the transactions with the defendants because the first defendant is a juristic person, and the agreements were large agreements. The defendants in the oral argument correctly did not persist in pursuing the point which has no merit. In *FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another* 2009 (3) SA 384 (T) the court clarified that the NCA did not apply where the agreement is entered into with a juristic person, and it is a large credit agreement as well as to suretyship relating to such agreement.

[10] The defendants in the plea pleaded that the second defendant did not obtain any credit from the plaintiff. They admitted that the plaintiff extended a credit facility but averred that there were no obligations to repay in terms of the overdraft facility. They averred that the second defendant was not provided with a credit facility. They stated that no notice of breach by first defendant was given and averred that the plaintiff has prematurely opted to terminate the overdraft facility.

[11] The defendants in the plea in relation to the revolving loan agreement denied that the agreement was entered into. The first defendant averred that the capital amount was not made available on a revolving basis. They averred that the first defendant did not breach the loan agreement due to the plaintiff failing to request that the first defendant maintain a sufficient balance on its nominated account for the purpose of the automatic debit and payment under the loan agreement. The plaintiff, they averred, failed to afford the first defendant an opportunity to remedy the breach.

[12] The plaintiff in the summary judgment application did not, as required by Rule 32(2)(c), attach copies of the liquid documents the claims are founded on and it purported to do so in a supplementary affidavit. The plaintiff did not seek leave to file a supplementary affidavit. Rule 32(1) provides the plaintiff may after the defendant has delivered a plea apply for summary judgment by means of an application supported by an affidavit, and that if the claim is founded on a liquid document a copy of the document shall be annexed to the affidavit. Rule 32(4) provides that no evidence may be adduced by the plaintiff otherwise than by the affidavit referred to. It is clear that the Rule makes no provision for the filing of a supplementary affidavit. As a result, the supplementary affidavit falls to be discounted. However, the copies of the documents the plaintiff relied on for the application of the summary judgments were attached to the summons served on the defendants and the plaintiff sought summary judgment on the claims set out in the same summons. The plaintiff, in my view, is not required to reattach documents attached to the summons. The compliance by the plaintiff with the requirements of subrule 32(2) is determined on consideration of the papers as a whole which includes the summons. See *Absa Bank Ltd v Le Roux and Others* 2014 (1) SA 475 (WCC) p484 para18.

[13] Rule 32(2) (b) states that the defendant to resist summary judgment may satisfy the court by affidavit that he has a *bona fide* defence to the action. Such affidavit shall disclose the grounds of the defence and the material facts relied upon. In *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426D it was held that the defendant must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence. Statements of facts that are equivocal or ambiguous or contradictory or fail to canvass the matters essential to the defence raised is not in compliance with the requirements of the Rule.

[14] The defendant in relation to both claims in the plea accept and deny that the first defendant concluded the agreements. The second defendant in relation to the first claim denies that he concluded an overdraft facility agreement and utilised the credit facility extended. But the claim against him is that he concluded a suretyship agreement to provide security for the obligations of the first defendant in the credit facility agreement.

[15] The defendants deny that the first defendant concluded a revolving loan agreement but aver that they are not liable because the plaintiff failed to give them notice of breach and it prematurely instituted action against them. It is only a party to the agreement who would be entitled to a notice to remedy the breach as set out in the agreement. An averment that they were entitled to a notice of breach contains an admission that they concluded the agreement in question.

[16] In my view, the plea read with of the opposing affidavit contains averments constituting vague bald denials, which are equivocal, ambiguous and contradictory. It is not known exactly what is denied and the basis of such denials. It does not disclose fully the nature and grounds of the defence and the material facts relied upon. It does not disclose a *bona fide* defence.

[17] The application falls to be granted.

[18] It is ordered as follows:

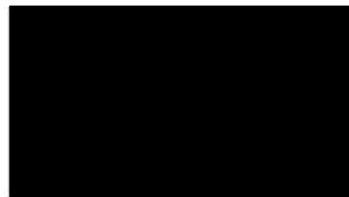
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10. The defendants to pay costs of suit on attorney and client scale.

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Mngadi J

APPEARANCES

Case Number : 1465/2022P

For the plaintiff : T.Q Reddy

Instructed by : Schuler Heerschoop Pienaar Xaba Inc.
STRUBENS VALLEY

For Defendants : N. Nepaul

Instructed by : Nervashnee Nepaul & Associates
DURBAN NORTH

Date of Hearing : 03 August 2023

Date of Judgment : 23 August 2023